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In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN SELLINGER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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INDEX

PAGE

Judgment and Opinion Below 1

Jurisdiction of this Court 2

Questions Presented for Review 2

Constitutional Provisions and Statute Involved 3

Raising the Federal Questions Below 4

Statement of the Case 4

Statement of Facts 6

Reasons for Granting the Writ 7

Prefatory Statement 7

1. Petitioner's conviction is so lacking of rational evidentiary support as to render his conviction violative of due process, where the crucial police witness' testimony was materially impeached by prior inconsistent statements and was in other respects so contrary to human reason that it was unworthy of belief 9

A. This Court need not accept the Appellate Court's characterization of the discrepancies as "minor," but can and should make its own determination as to the import of the impeachment 9

B. The principle of *Thompson* v. *Louisville,* 362 U.S. 199—that a conviction totally devoid of evidentiary support offends due process—should be extended to this case, where, though there is some evidence, that evidence is so qualitatively poor as to render unconscionable the fact-finder's reliance thereon to sustain conviction 9

PAGE

C. Under these circumstances, the Appellate Court's simple reliance upon the general principle that credibility is an issue for the finder of fact cannot suffice to authorize this conviction in the face of substantial impeachment as at bar 9

Certiorari should be allowed to examine the philosophy underlying *Thompson* to determine whether it should be extended to cover the instant situation 9

2. Petitioner was deprived of a fair and impartial trial in accordance with due process of law by the prosecutor's prejudicial remarks in opening statement as to matters never offered in evidence (implying petitioner was well-known to law enforcement personnel, and referring directly to a hypodermic needle found near the arrest site), and in closing argument (mischaracterizing the arrest as a "felony stop"), thereby inviting the jury to believe that petitioner was a "bad man" who was probably guilty and thus to convict despite the massive impeachment of the police officer referred to in (1), above 16

The Appellate Court, in affirming while acknowledging the impropriety of some of the prosecutor's remarks, utilized a constituionally impermissible standard of "harmless error" at odds with prior holdings of this Court, *viz.*, *Fahy* v. *Connecticut*, 375 U.S. 85, and *Chapman* v. *California*, 386 U.S. 18 16

Conclusion 21

Appendices:

Appendix A—Order of the Appellate Court of Illinois, Second District .....App. 1

Appendix B—Order of Illinois Supreme Court denying petition for leave to appeal .....App. 6

AUTHORITIES CITED

Cases

PAGE

Barbee v. Warden, 331 F.2d 842 (4 Cir. 1964) 15

Barnes v. United States, 365 F.2d 509 (D.C. Cir. 1966) 19

Bollenbach v. United States, 326 U.S. 607 (1946) 7

Brady v. Maryland, 373 U.S. 83 (1963) 15

Chapman v. California, 386 U.S. 18 (1967) 3, 16, 17

Curran v. Delaware, 259 F.2d 707 (3 Cir. 1958) 15

Dunn v. United States, 307 F.2d 883 (5 Cir. 1962) 19

Fahy v. Connecticut, 375 U.S. 85 (1963) 3, 16

Gaito v. Brierly, 485 F.2d 86 (3 Cir. 1973) 20

Government of Virgin Islands v. Oliver, 360 F.2d 297 (3 Cir. 1966) 19

Hall v. United States, 150 U.S. 76 (1893) 19

In re Winship, 397 U.S. 358 (1970) 11

Leary v. United States, 395 U.S. 6 (1969) 11

Michelson v. United States, 335 U.S. 469 (1948) 19

Mincey v. Arizona, 437 U.S. 385 (1978) 10

Napue v. Illinois, 360 U.S. 264 (1959) 8

People v. Caravdella, 31 Ill.2d 382, 212 N.E.2d 1 (1964) 12

Pyle v. Kansas, 317 U.S. 213 (1942) 15

Thompson v. Louisville, 362 U.S. 199 .....2, 8, 9, 11

Turner v. United States, 396 U.S. 398 (1970) 11

United States v. Goodwin, 492 F.2d 1141 (5 Cir. 1974) 20

United States v. Harringron, 490 F.2d 487 (2 Cir. 1973) 19

PAGE

United States v. Liguori, 438 F.2d 663 (2Cir. 1971) 11

United States v. Signer, 482 F.2d 394 (6 Cir. 1973) 19

Vaughn v. State, 215 Ind. 142, 19 N.E.2d 239 (1939) 20

Other Authority

CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 68 (2d ed. 1972) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioner, John Sellinger, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, Second District, to review its decision affirming judgments of conviction in the Nineteenth Judicial Circuit, Lake County, Illinois, adjudging petitioner guilty of two counts of possession of burglary tools.

Judgment and Opinion Below

On June 7, 1979, the Illinois Appellate Court, Second District, entered its Order* affirming petitioner's conviction

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* The Illinois Appellate Court disposed of the cause by an unpublished order, per Illinois Supreme Court Rule 23.

on both counts, No. 78-2. A copy of the Appellate Court's Order is attached hereto as Appendix A. A timely petition for leave to appeal to the Illinois Supreme Court was denied on October 1, 1979 (No. 52315). (App. B)

Jurisdiction of this Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on October 1, 1979. This petition for Writ of Certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, U.S. Code, sec. 1257(3), and Rule 22.1 of the Rules of this Court.

Questions Presented for Review

1. Was petitioner's conviction so lacking of rational evidentiary support as to render his conviction violative of due process, where the crucial police witness' testimony was materially impeached by prior inconsistent statements and was in other respects so contrary to human reason that it was unworthy of belief?

A. Must this Court accept the Appellate Court's characterization of the discrepancies as "minor"?

B. Should the principle of *Thompson* v. *Louisville,* 362 U.S. 199—that a conviction totally devoid of evidentiary support offends due process—extend to this case, where, though there is some evidence, that evidence is so qualitatively poor as to render unconscionable the fact-finder's reliance thereon to sustain conviction?

C. Under these circumstances, may the Appellate Court simply rely upon the general principle that credibility is an issue for the finder of fact, to justify affirmance?

2A. Was petitioner deprived of a fair and impartial trial in accordance with due process of law by the prosecutor's prejudicial remarks in opening statement as to matters never offered in evidence (implying petitioner was well-known to law enforcement personnel, and referring directly to a hypodermic needle found near the arrest site) and in closing argument (mischaracterizing the traffic arrest as a "felony stop"), thereby inviting the jury to believe that petitioner was a "bad man" who was probably guilty and thus to convict despite the massive impeachment of the police officer referred to in (1) above?

2B. Did the Appellate Court, in affirming while acknowledging the impropriety of some of the prosecutor's remarks referred to in (A) above, utilize a constitutionally impermissible standard of "harmless error" at odds with prior holdings of this Court, *viz, Fahy* v. *Connecticut,* 375 U.S. 85, and *Chapman* v. *California,* 386 U.S. 18?

Constitutional Provisions and Statute Involved

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ;"

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1 . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

Chapter 38, Section 19-2(a), Illinois Revised Statutes, for violation of which petitioner stands convicted,* defines the offense thus:

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* Although petitioner does not attack the constitutionality of the statute, its language is fully set forth so that the Court may perceive that it was indispensible for the jury to believe the impeached police officer in order to find (a) that petitioner possessed the tools with the requisite intent delineated by the statute as an element of the offense, and (b) that he "possessed" the tools at all.

"Possession of Burglary Tools. (a) A person commits the offense of possession of burglary tools when he possesses any key, tool, instrument, device, or any explosive, suitable for use in breaking into a building, housetrailer, watercraft, aircraft, motor vehicle as defined in the Illinois Vehicle Code, railroad car, or any depository designed for the safekeeping of property, or any part thereof, with intent to enter any such place and with intent to commit therein a felony or theft."

Raising the Federal Questions Below

Petitioner challenged the sufficiency of the prosecution's case by appropriate motion (for directed verdict) in the trial court (App. 1), alleging primarily the unbelievability of the impeached officer's testimony. In the Appellate Court he argued that the evidence was insufficient, and that it failed to prove him guilty beyond a reasonable doubt.

The prejudicial remarks in the prosecutor's opening statement and closing argument were objected to at trial, and petitioner unsuccessfully moved for a mistrial. He urged on appeal that the prosecutor's conduct deprived him of a constitutionally fair trial as guaranteed by due process of law.

The Appellate Court reached the merits of each issue (see App. A), and each point again was substantially raised in the petition for leave to appeal to the Illinois Supreme Court, which denied relief. (App. B)

Statement of the Case

Petitioner, John Sellinger, was indicted in a 2-count indictment charging possession of burglary tools (No. 76 CF 88).

During opening statements in petitioner's jury trial, the prosecutor made two remarks he was unable to substantiate with admissible evidence, and as to which the court precluded the development of prejudicial implications, that is: (a) that petitioner was a known criminal, recognized by law enforcement personnel, and (2) that a hypodermic needle, which the prosecutor never offered in evidence, was found near the arrest site. (See App. 4-5).

The State's case as to two material elements of the offense—possession by petitioner, and possession with the requisite criminal intent—was entirely circumstantial and wholly dependent upon the testimony of Officer Currie.

Currie's testimony was repeatedly impeached, including three times on facts material to the above elements. His testimony is otherwise incredible for reasons set out in the Argument below.

While recognizing that the case rested on the testimony of the officer, whose testimony, agreed the judge, was repeatedly impeached, the trial judge denied petitioner's motion for a directed verdict at the close of the State's case.

During closing argument, the prosecutor prejudicially misstated that when Currie stopped the car in which petitioner was a passenger, he (Currie) was in fear for his life because it was a "felony stop." According to the evidence, however, Currie had stopped the car for a traffic offense (improper language), and neither occupant resisted arrest or was discourteous.

The jury found petitioner guilty, and he was sentenced to 1 to 3 years imprisonment.

Statement of Facts

The facts adduced at trial are set forth within the Appellate Court's opinion, App. A, and are not repeated here to avoid unnecessary duplication. However, the court has characterized the discrepancies in Officer Currie's testimony as "minor" without ever setting forth what the inconsistencies were, and has stated as facts only that version upon which conviction could conceiveably have been based. (See App. A, pp. 1-2)

The details of Currie's impeachment are fully set forth, with record references, in Point 1 of the Argument which follows, pp. 9-16, *infra*. See especially table on page 10, *infra*.

REASONS FOR GRANTING THE WRIT

Prefatory Statement

The Appellate Court concludes that the allegedly prejudicial occurrences at trial did not cause substantial prejudicial to petitioner, for "we find the evidence was so substantial as to render any error . . . non-prejudicial." (App. A, p. App. 5).

Yet this is bootstrap logic, for the evidence upon which the court necessarily relies in so concluding (see App. A), is merely that version of the various aspects of the impeached officer's testimony which must be believed in order to convict. Moreover, the court characterizes the discrepancies in that officer's testimony as "minor" without ever mentioning the substance of the inconsistencies clearly delineated in petitioner's Brief, choosing to fall back on the maxim that the jury properly resolves questions of credibility. (App. A, p. App. 2).

If ever a reviewing court's decision violated the salutary principles of *Bollenbach*,[1] this one does.

• • •

[1] "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . .

". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." Mr. Justice Frankfurter, speaking for the Court, in *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

Because the impeached officer had his own convoluted explanations for the inconsistencies, (see pp. 12-13, *infra*), no plausible claim of perjured testimony has been made;[2] but this record reflects a conviction, upon which petitioner stands sentenced to the penitentiary, based upon evidence which is worthless—which is worse than no evidence at all. For if there were no evidence at all, the conviction without doubt would fall under *Thompson* v. *Louisville,* 362 U.S. 199 (1960). There, Your Honors saw fit to grant certiorari to review a police court judgment imposing two $10 fines, reversing upon finding no evidence whatsoever to support the charges.[3] But here, since a police officer who obviously has no regard for the truth has managed to hoodwink not only the jury but also the Appellate Court, this petitioner may be wholly without redress.

• • •

Certiorari should be allowed to resolve the important issues raised herein—important not only to petitioner, but to all of us; for where one can stand convicted upon the Alice-in-Wonderland proceedings reflected by this record, who indeed among us is safe from the high-handed policeman and the overzealous prosecutor?

Unable to demonstrate bald perjury or a total lack of evidence, petitioner is in a limbo between remedies heretofore recognized by this Court. We can only hope that certiorari will be allowed to fill the gap.

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[2] *Cf. Napue* v. *Illinois,* 360 U.S. 264 (1959).

[3] In the prosecutor's calculated attempt at bar to inject prejudice by reference to a hypodermic needle, to petitioner's recognition by law officers, and (erroneously) to the traffic arrest as a "felony stop," we hear echoes of just that sort of persecution this Court seemed to perceive in *Thompson, supra,* at 200-01.

1.

Petitioner's conviction is so lacking of rational evidentiary support as to render his conviction violative of due process, where the crucial police witness' testimony was materially impeached by prior inconsistent statements and was in other respects so contrary to human reason that it was unworthy of belief.

- **A. This Court need not accept the Appellate Court's characterization of the discrepancies as "minor," but can and should make its own determination as to the import of the impeachment.**
- **B. The principle of Thompson v. Louisville, 362 U.S. 199—that a conviction totally devoid of evidentiary support offends due process—should be extended to this case, where, though there is some evidence, that evidence is so qualitatively poor as to render unconscionable the fact-finder's reliance thereon to sustain conviction.**
- **C. Under these circumstances, the Appellate Court's simple reliance upon the general principle that credibility is an issue for the finder of fact cannot suffice to authorize this conviction in the face of substantial impeachment as at bar.**

Certiorari should be allowed to examine the philosophy underlying Thompson to determine whether it should be extended to cover the instant situation.

In characterizing the discrepancies in Officer Currie's testimony as "minor," the Appellate Court has flatly disregarded the details called to its attention in petitioner's Brief below. These may best be illustrated thus:

Currie's trial testimony (June 2, 1977)	*Prior Inconsistent Statements*
1. As he stopped Taglia's car for improper lane usage, he saw an object [a pouch containing a set of lock picks] come out of the window on the passenger's side of the car. (Tr. 112)	The object he saw came out of the driver's side; he did not see anybody throw anything out. Hearing, December 9, 1975 (Tr. 163)
2. He saw petitioner leaning over the lock of the Village Antique Shop. (Tr. 155)	His police report contained, that "one of the subjects" was leaning toward the Coutellerie De Geneve, a shop with an adjoining door. (Tr. 155)
3. Admittedly he did not see either man walk away, though he wrote in his police report that he did. (Tr. 179-81)	When he cruised past the Village Antique Shop, the defendants walked away. Police Report. (Tr. 179-81)
4. He was in uniform, recognizable as a police officer. (Tr. 181)	He was in "plainclothes, unfortunately." Hearing, October 26, 1976. (Tr. 182)

Consideration of the elements of the crime charged (see pp. 3-4, *supra*) demonstrates the crucial importance of this officer's testimony. In view of this, the discrepancies certainly are not "minor".

This Court frequently has recognized that it has a duty to assess facts underlying claims of constitutional deprivation. See, *e.g., Mincey* v. *Arizona,* 437 U.S. 385, 398 (1978).

The instant judgment offends due process in several respects.

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

How can it be said that petitioner's guilt of every element of the offense was established beyond a reasonable doubt, as required to satisfy due process, where proof (such as it was) both of "possession" and of the criminal intent with which the tools allegedly were possessed utterly depended on the testimony of Officer Currie? How can petitioner, the passenger, pay the penalty for possession based (in one count) upon tools locked in the trunk of the other man's car,[4] and (in another count) upon testimony, about an object being thrown out from the *passenger's side,* from a witness who previously testified under oath that it was thrown out from the *driver's* side? (See p. 10; item 1, *supra.*)

In *Thompson* v. *Louisville,* 362 U.S. 199 (1960), this Court ruled that a conviction wholly devoid of evidentiary support violates due process. While no subsequent case squarely extends this rule to instances involving some, albeit inadequate, evidence, the reasoning of the Second Circuit in *United States* v. *Liguori,* 438 F.2d 663 (2 Cir. 1971), is impeccable. In deciding to apply *United States* v. *Leary,* 395 U.S. 6 (1969), and *United States* v. *Turner,* 396 U.S. 398 (1970), retroactively,[5] the court applied "the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record

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[4] The car was owned and driven by Taglia; petitioner was the passenger. Moreover, there was absolutely no evidence from which it could be inferred that petitioner was aware of the tools in the trunk or that he has access thereto.

[5] These cases held that the statutory presumptions inferring knowledge of illegal importation of marijuana *(Leary)* and cocaine *(Turner)* from proof of possession, were unconstitutional.

discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law,'' *id.* at 669. Citing *Thompson, supra,* the court combined that holding with *Leary* and *Turner,* concluding:

> ''*Leary* and *Turner* support the basic principle that a proper finding of guilt cannot be based on evidence that is *rationally insufficient* to support that finding.'' *Ibid.* (Emphasis added.)

• • •

At this juncture it is appropriate to set out in what respects Officer Currie's testimony—aside from its inconsistencies—is ''rationally insufficient'' to support the conviction.

On several occasions during cross-examination, when confronted with prior inconsistent statements on his police report, Currie boldly retorted that he was mistaken when he wrote the report. (Tr. 155, 181) This claim of ''mistakes'' is made even though the incident was fresh in his mind at the time he wrote the report several hours after the occurrence. Also, Currie twice denied that certain questions were asked of him and denied that he gave certain answers to those questions while under oath at prior hearings. In effect, Currie is saying that two different grade ''A'' official court reporters either took down the testimony wrong or intentionally altered the transcripts. (Tr. 163, 182)

As in *People* v. *Caravdella,* 31 Ill.2d 382, 202 N.E.2d 1 (1964), where the court reversed, the officer's conflicting testimony ''can hardly be explained as a mere mistake. . .'' *Id.* at 4.

Here, Currie convinced the jury and the State reviewing court that his memory one and a half years later was better than it was the evening of the occurrence when he wrote his

police reports, and explained the contradictions in the reports by saying he made mistakes while writing them. Currie tells whichever version of his story he feels will do the most harm to petitioner at the time he tells it. It matters little that the major portion of his story is fabricated, or which version, if any, is the truth.

What Currie did here has been termed ''blowing hot and cold.'' See CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 68 (2d ed. 1972).

While testifying on cross-examination, Currie stated that at 7:30 p.m. on a dark winter's night (Tr. 155, 156), he kept the defendants under observation for 15 seconds while driving at the speed of 15 to 20 m.p.h. (Tr. 177) At either speed Currie would have travelled approximately 420 to 450 feet—up to 1½ times the length of a football field.

As Currie was driving past where the defendants were allegedly attempting to burgle, Officer Currie was turned to his right observing them. (Tr. 177) He kept track of the traffic with his peripheral vision (Tr. 177); he was able to look through parked cars (Tr. 179) and concentrate on Sellinger enough that he could see his right eye (Tr. 186, 187) looking at the lock of the Village Antique Shop, even though the doorway was recessed. (Tr. 182, 183) Currie testified not that it appeared that Sellinger was looking at the lock, but that under the conditions set forth he could see Sellinger's right eye and that eye was looking at the lock. (!) (Tr. 183, 186, 187) The distance from the street where Currie's car was travelling to where Sellinger was standing, was not testified to, but Currie did testify that the recessed doorway was about six feet deep, then there is a sidewalk, and Currie testified that there were parked cars.

The Appellate Court also thought it significant that the petitioner hurried away when he saw the police. (App. A,

p. App. 1) That evidence by Currie was also impeached. (Tr. 179-82) The Appellate Court, amazingly, used an admitted lie as direct evidence to defeat the claim that the State's circumstantial case did not negate every reasonable hypothesis of innocence.[6]

* * *

What view should a federal court take of all the foregoing?

We submit this case is a hybrid, involving some of the principles of the "perjured evidence" line of cases and others from *Thompson* and its progeny. Additionally, there are principles here involved which should carry over from the "withholding of evidence" cases.

In the face of the prosecution's usual answer, "The prosecutor did not knowingly use any perjured testimony," we must stress that this Court has never hesitated to remedy

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[6] The Appellate Court thought Gernenz corroborated Currie. (App. A, p App. 3) That corroboration was at best tenuous.

Officer Gernenz testified that he was parked in a parking lot where he could observe what the defendants were doing in the doorway of the Village Antique Shop. (Tr. 50) Gernenz, though, was parked 350 feet away. (Tr. 51) He testified to this on direct examination. It was 7:30 p.m. on a dark winter's night. (Tr. 85, 86) Gernenz testified that he saw Sellinger bent over the door lock. (Tr. 51) Gernenz knew beforehand that Walker recognized the defendants and was suspicious of them, so he interpreted the simple act of window-shopping as an attempted burglary. All this he perceived at a distance from which most observers would need binoculars to observe what was happening.

This raises a serious doubt as to Gernenz's observations. He was fortified with a pre-conceived notion of suspicion; the dark conditions even though there was artificial light; the distance of 350 feet; and the time discrepancies needed to pick a lock; it all leads one to believe that Officer Gernenz might not have lied but that he misperceived what he thought he saw.

a wrong brought about by perjured testimony, even if the prosecutor is not culpable, where the perjury is in testimony of (or solicited by) a policeman. *Pyle* v. *Kansas,* 317 U.S. 213 (1942); *accord, Curran* v. *Delaware,* 259 F.2d 707 (3 Cir. 1958). These cases unequivocally hold that if a police officer gives or solicits false testimony, there is no requirement that the prosecutor be party to or even be cognizant of the falseness of the testimony, to entitle the state prisoner to federal relief. In *Curran,* expressly relying on *Pyle,* the court affirmed the lower court's grant of habeas corpus to a state prisoner whose conviction depended upon false police testimony not chargeable to the prosecutor. Noting that "The testimony of police officers usually is given credence by members of the jury," 259 F.2d at 712, the court held that the false police testimony was sufficient to cause the defendant's trial to

> "pass the line of tolerable imperfection and fall into the field of fundamental unfairness." *Id.* at 713.

This principle—that a defendant may be entitled to relief for damage not attributable to the prosecutor—more recently has surfaced in a different but analogous context. In applying the rule that non-disclosure of evidence favorable to the defense violates due process,[7]

> "it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution . . ." *Barbee* v. *Warden,* 331 F.2d 842, 846 (4 Cir. 1964).

* * *

Upon this record, considered in the light of all the foregoing, the Court should allow certiorari to determine exactly what due process will tolerate in that "twilight zone" where there is insufficient hard proof of perjury, but where

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[7] *Brady* v. *Maryland,* 373 U.S. 83 (1963).

such evidence as there is removes the cause from technical application of the somewhat limited holding of *Thompson.* Such a defendant must not be allowed to languish behind bars because his case does not precisely fit within any of the presently-known categories of due process deprivation. We submit the Court should fashion a rule to apply to those cases where, although there is some evidence, and it cannot properly be called "perjured," the evidence is so qualitatively poor that due process will not countenance a conviction.

2.

Petitioner was deprived of a fair and impartial trial in accordance with due process of law by the prosecutor's prejudicial remarks in opening statement as to matters never offered in evidence (implying petitioner was well-known to law enforcement personnel, and referring directly to a hypodermic needle found near the arrest site), and in closing argument (mischaracterizing the arrest as a "felony stop"), thereby inviting the jury to believe that petitioner was a "bad man" who was probably guilty and thus to convict despite the massive impeachment of the police officer referred to in (1), above.

The Appellate Court, in affirming while acknowledging the impropriety of some of the prosecutor's remarks, utilized a constitutionally impermissible standard of "harmless error" at odds with prior holdings of this Court, viz., Fahy v. Connecticut, 375 U.S. 85, and Chapman v. California, 386 U.S. 18.

Although this Court unequivocally has held:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87 (1963),

and, as regards constitutional error in particular,

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman* v. *California,* 386 U.S. 18, 24 (1967),

the Appellate Court in the case at bar has flatly concluded that certain highly prejudicial prosecutorial conduct did not cause prejudice to petitioner, for "we find the evidence was so substantial as to render any error . . . non-prejudicial." (App. A, p. App. 5)

We have already set forth a lengthy exposition of the evidence at trial, including the inconsistencies and unbelievabilities, in order to have a base from which now to contend that in so concluding, the Appellate Court was manifestly in error. Surely it cannot be said that the evidence outlined in the preceding Point was "so substantial" as the Appellate Court believed in determining that all the alleged prejudicial errors were harmless.

Keeping in mind what that evidence was, consider that the jury was exposed to the following inflammatory matter:

In his opening statement, the prosecutor told the jury that a hypodermic needle was found in the area after the arrest. (Tr. 23) The prosecutor also stated that as Arthur W. Walker, the chief investigator for Lake County State's Attorney's Office, who was a police officer for ten and a half years, walked past the defendants, "something strikes him. He faintly recognizes them. He walks another ten or fifteen feet.[8] He turned around and the defendants turned around and they looked at each other." (Tr. 18-20) To reinforce the implication that petitioner was a known criminal, Walker testified over objection that he recognized

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[8] Objection and argument at this point. The judge warned the prosecution and denied a motion for mistrial, but did not rule on the objection.

petitioner and that they walked past each other and turned around and looked at each other. (Tr. 28, 29) The only possible inference the jury could draw is that Walker recognized petitioner because he is a known criminal.

What we have is a carefully conceived strategy of injecting prejudice into the trial of the cause.

By telling the jury that a hypodermic needle was found, the prosecutor told them that these defendants are bad people; that they are junkies and all junkies are known to commit crimes to support their habit; and that the most often committed crime is burglary.

The Appellate Court admitted that the remark about the hypodermic needle during opening statement was "clearly improper," (App. A, p. App. 5), yet found no prejudice.

The State deliberately defied the orders of the judge pertaining to the prejudicial statements. The Appellate Court found nothing wrong with this tactic, even though it was done in defiance of a court order.

During closing argument the prosecutor argued over objection that "even though (Currie) had a back up in unmarked car, it is a felony stop . . . The officer was worried about his own safety." (Tr. 543) The evidence from the transcript reflects that the defendants were stopped for "improper lane usage." That is an ordinance violation punishable by fine, and is not a felony.

Considering the evidence, such as it was (see Point 1, *supra*), this combination of events was indeed prejudicial to petitioner. Each and every one of the references complained of conveyed to the jury information they are not entitled to know, precisely *because* it is so prejudicial.

* * *

Evidence of other offenses is regarded as so highly persuasive of a defendant's guilt that, unless certain precise

exceptions to the general rule (not even arguably applicable here) are met, admission of such evidence is reversible error. *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948). This rule, of course, applies to arguments of prosecuting counsel as well; where reference is made in argument to inadmissible other offenses, the conviction cannot stand. *Hall* v. *United States,* 150 U.S. 76, 81-82 (1893).

Reversing for prejudicial opening statement of the prosecutor, the court in *United States* v. *Signer,* 482 F.2d 394 (6 Cir. 1973), said:

> "The opening statement should not be used to poison the minds of the jury against the defendant before the jury has heard the evidence, or to improperly prejudice the defendant in the eyes of the jurors . ." *Id.* at 398.

Similarly, although the court instructed the jury that opening statements are not evidence, the government attorney's statement, including references to defendant's prior arrest and escape from custody, impelled reversal in *Government of Virgin Islands* v. *Oliver,* 360 F.2d 297 (3 Cir. 1966).

In *Dunn* v. *United States,* 307 F.2d 883 (5 Cir. 1962), the prosecutor's prejudicial and inflammatory opening statement and closing argument required reversal, although the court had cautioned the jury, specifically, to disregard the offending statements.

Analogous, also, to what occurred here—that is, the prosecutor informing the jury indirectly of prejudicial matters certainly inadmissible directly or evidence—are those cases holding that so-called "mug shots," which convey to the jury that defendant has had prior trouble with the law, are inadmissible, and that their improper admission necessitates that the conviction be overturned. See, *e.g., Barnes* v. *United States,* 365 F.2d 509 (D.C. Cir. 1966); *United States* v. *Harrington,* 490 F.2d 487, 490-96 (2 Cir. 1973).

In *Barnes, supra,* the court quoted and adopted the following rule:

> "[W]hat may not be done directly may not be done by indirection or subterfuge." 365 F.2d at 511, *quoting from Vaughn* v. *State,* 215 Ind. 142, 19 N.E.2d 239, 241 (1939).

Cf. United States v. *Goodwin,* 492 F.2d 1141, 1147 (5 Cir. 1974) (reversed where prosecutor called defendant a "fugitive" in closing argument); *Gaito* v. *Brierly,* 485 F.2d 86, 88 (3 Cir. 1973), where the court held that

> "compelling defendant to appear before a jury in his prison clothes unconstitutionally infringes his due process right to be presumed innocent until proven guilty."

* * *

The rationale of all the foregoing decisions squarely condemns what the prosecutor did here. The Appellate Court's bald conclusion, in the face of the evidence as set forth in Point 1, *supra,* that the occurrences complained of were not prejudicial, has no foundation in law or in fact. The Appellate Court's conclusion to the contrary necessarily utilized a standard not in conformance with that mandated by this Court in *Fahy* and *Chapman, supra.*

The court's order (App. A) does not state what, if any, "harmless error" rule may have been applied; only the conclusion is stated that because of the "substantial" evidence of petitioner's guilt, any and all error was harmless.

Certiorari should be allowed so that this Court may, once more, iterate the "harmless error" rule both in principle and application; for it appears that the reviewing courts in Illinois currently do violence to the principle that no conviction may stand, consistent with due process, unless the court can declare a belief, beyond a reasonable doubt, that the error was harmless. Moreover, this case

demonstrates that prosecutors disregard the law. Coupled with the substance of Point 1, the argument here presented by the prosecutor's clearly improper conduct poses a serious problem to the administration of criminal justice which this Court should note and remedy.

CONCLUSION

For either or both of the reasons above set forth, certiorari should be allowed; and, upon consideration of the substance of petitioner's arguments, his conviction should be reversed as repugnant to due process of law.

Respectfully submitted,

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APPENDIX

APPENDIX A

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

(Filed June 7, 1979)

Defendant, John Sellinger, was convicted of two counts of possession of burglary tools and sentenced to concurrent terms of one to three years imprisonment.

He appeals contending that the trial court erroneously denied his motion for a directed verdict at the close of all the evidence and that he was denied a fair trial by improper remarks of the prosecutor in his opening statement and closing argument.

From our examination of the record and briefs we determine that an opinion would have no precedential value and that no substantial question is presented.

At about 7:30 p.m. on November 25, 1975, defendant and Sam Taglia were observed in the Lake Forest business district by Officer William Gernenz as they walked up to the entranceway of a dress shop. He saw defendant approach the door while Taglia stood in front of the shop looking up and down the street. Shortly thereafter defendant exited the entranceway, spoke with Taglia for a moment and the two men crossed the street to an antique shop. There Gernenz observed defendant bending over the lock to the door of the shop while Taglia again stood in front of the shop looking up and down the street. Gernenz radioed a request that an officer in a marked squad car cruise past the antique shop and Officer John Currie did so. When this occurred defendant and Taglia hurriedly left the area of the antique shop, entered Taglia's car and departed with Taglia driving. Both Gernenz and

Currie followed in their squad cars and subsequently stopped Taglia for improper lane usage. Just before Taglia stopped the car a small leather case was thrown from it from the passenger's side where defendant was seated. The officers retrieved the case and found it contained a set of lock picks and defendant stated he was a certified locksmith and the lock picks were his. The two men were then arrested and when Taglia's car was searched at the police station other tools suitable for the commission of burglary were discovered locked in the trunk. About a week later the lock to the antique shop was examined by the police and found to contain two broken-off pieces of a lock pick. Some time in December an officer found a rusty, broken lock pick in a gutter in front of the antique shop and an expert testified it was highly probable the broken pieces found in the lock were once part of this lock pick and that it was made by the same machine as a lock pick from the leather case which he had examined. On this evidence the jury determined defendant to be guilty on both counts.

A directed verdict of not guilty is proper where the evidence, viewed in a manner most favorable to the State, fails to establish defendant's guilt beyond a reasonable doubt. (*People* v. *Tibbs* (1978), 57 Ill. App. 3d 1007, 373 N.E.2d 624; *People* v. *McCord* (1977), 46 Ill. App. 3d 389, 361 N.E.2d 13; see Ill. Rev. Stat. 1973, ch. 38, par. 115-4 (k).) Defendant first argues that the testimony of Officer Currie was so impeached by prior inconsistent statements that a verdict of not guilty should have been directed. Having examined these prior statements, we find the discrepancies involved were minor in nature and did not as a matter of law destroy the credibility of the officer. They merely presented to the jury for resolution. (*People* v. *Clay* (1963), 27 Ill. 2d 27, 187 N.E.2d 719, *cert. denied,* 374 U.S. 844, 10 L. Ed. 2d 1064, 83 S. Ct. 1901; *People* v. *Patrick*

(1977), 46 Ill. App. 3d 122, 360 N.E.2d 792.) Neither do we find that his testimony is contrary to the laws of nature or universal human experience, as suggested by defendant, and note that this testimony was corroborated by Officer Gernenz. Defendant erroneously states in his brief that the trial court agreed with him during argument of his motion for a directed verdict that no reasonable jury could find him guilty based upon Currie's impeached testimony; the record reflects that the judge merely agreed some aspects of Currier's testimony had been impeached.

Defendant next argues this case calls for application of the rule that where the proof is entirely circumstantial, if there is any reasonable hypothesis arising from the evidence, consistent with the innocence of the defendant, it must be adopted (*e.g., People* v. *Turner* (1973), 13 Ill. App. 3d 1079, 302 N.E.2d 365) and, therefore, the trial court was required to direct a verdict based on his theory that he was merely window shopping. We do not agree, however, that the proof here was entirely circumstantial as there was direct evidence defendant possessed the lock picks and of his actions in relation to the two business buildings. In any event, window shopping is not a reasonable hypothesis of innocence in these circumstances. The evidence that defendant leaned over the antique shop lock, hurried away when he saw police and was in a car containing tools suitable for burglarizing is quite inconsistent with a theory he was only window shopping.

Defendant also argues the trial court should have directed a verdict as to the charge of possession of the tools locked in the trunk of the car owned by Taglia (the other count alleged possession of the lock picks). He reasons that his mere presence in the car, without more, was insufficient to prove constructive possession by him of the tools found in the trunk (see generally *People* v. *Cogwell*

(1972), 8 Ill. App. 3d 15, 288 N.E.2d 729). However, in light of the other evidence submitted of defendant's possession of the lock picks and his conduct at the antique shop, we believe the trial court properly allowed this count to be submitted to the jury. See *People* v. *Winslow* (1975), 26 Ill. App. 3d 1035, 325 N.E.2d 426, *cert. denied* (1976), 424 U.S. 915, 47 L. Ed. 2d 319, 96 S. Ct. 1114.

In our view the trial court did not err in denying defendant's motion for a directed verdict of not guilty nor can we say that defendant was not proved guilty beyond a reasonable doubt.

Defendant's other contention is that remarks of the prosecutor denied him a fair trial. The first comment of which he complains occurred during the prosecutor's opening statement when he stated that Arthur Walker, a state's attorney investigator and former policeman (who apparently just happened to be in the vicinity), recognized defendant on the night in question and then spoke to Officer Gerenz who proceeded to observe defendant and Taglia. Defendant argues this remark and Walker's later testimony on the point was improper and prejudicial because it conveyed to the jury the impression that defendant was well known by police officers because of prior criminal activities, citing *People* v. *Blakely* (1977), 50 Ill. App. 3d 536, 541-44, 365 N.E.2d 996, 999-001. In *Blakely* the State embarked upon a line of questioning of a police officer which it had represented to the court was for the purpose of supporting the officer's identification of the defendant. The officer then testified he had previously seen the defendant in three different Chicago police districts during the normal course of his duties. The court found the only real purpose of the questions and answers was to convey to the jury the impression that the defendant was well known by police officers because of prior criminal activities and, as

the evidence was not so overwhelming as to render the error non-prejudicial, it reversed the conviction. Here we believe the prosecutor's remark and Walker's testimony that he merely recognized defendant do not give rise to a prejudicial impression on the part of the jurors and, in any event, we find the evidence was so substantial as to render any error in this regard non-prejudicial.

During his opening statement the prosecutor also remarked that a hypodermic needle was found near the site of the arrest shortly after defendant had been taken to jail. While this remark was clearly improper, as the needle was not relevant evidence in this case, we do not find it caused substantial prejudice to defendant.

During his closing argument the prosecutor also commented that Officer Currie had made a "felony stop" of Taglia's car and defendant argues this was a prejudicial misstatement of evidence as the testimony had been that the car was stopped for a traffic violation. We find defendant sustained no substantial prejudice by this remark.

For the reasons stated the conviction of defendant on both counts of possession of burglary tools is affirmed.

Affirmed.

NASH, J., GUILD, P.J., and SEIDENFELD, J.

APPENDIX B

ILLINOIS SUPREME COURT

CLELL L. WOODS, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 1, 1979

Mr. Julius Lucius Echeles
Attorney at Law
35 East Wacker Drive
Chicago, IL 60601

No. 52315—People State of Illinois, respondent, vs. John Sellinger, petitioner. Leave to appeal, Apellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ *Clell L. Woods*
Clerk of the Supreme Court